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A Legal Basis for Non-Arbitrary Detention: *Serdar Mohammed v Secretary of State for Defence*

Jane M. Rooney*

Introduction

The Court of Appeal decision of *Serdar Mohammed v Secretary of State for Defence*[1] has been described by government officials as yet another example of the misapplication of human rights on the battlefield and as further evidence of the fact that a new British Bill of Rights is required to prevent the application of human rights abroad.[2] The decision found that the UK government was in violation of Article 5 right to liberty and security under the European Convention on Human Rights for the detention of a suspected Taliban Commander in Afghanistan for almost four months. It found that the detention of Serdar Mohammed had no legal basis in domestic law, international humanitarian law or under United Nations Security Council Resolution (UNSCR) 1890 (2009).[3] Furthermore, it found that because there was no legal basis in international humanitarian law for detention in non-international armed conflicts (NIACs), international humanitarian law could not be taken into account in determining what constituted 'non-arbitrary' detention for the purposes of Article 5.[4] The Court suggested that in order for the UK government to avoid a violation of Article 5 the UK should legislate to provide for a legal basis in domestic law for detention beyond 96 hours.[5] This solution has been met with approval by commentators.[6] However, the fact that more than a legal basis and procedural

* Jane M. Rooney, University College, Durham University. Thanks to Henry Jones and Ruth Houghton for their suggestions. All errors remain my own.

[1] *Serdar Mohammed v Secretary of State for Defence* [2015] EWCA Civ 843.

[2] O. Bowcott, "British forces illegally detained Afghan suspect, court of appeal rules" (July 30, 2015), Guardian.co.uk, *http://www.theguardian.com/law/2015/jul/30/british-forces-illegally-detained-afghan-suspect-court-of-appeal-rules* [Accessed September 2, 2015].

[3] See fn. 1 paras 125—253; UNSC Res 1890 (8 October 2009) UN Doc S/RES/1890.

[4] above paras 123, 166, 281.

[5] above paras 10 (ii), 241, 363 (iv).

[6] M. Milanovic, "Some Thoughts on the Serdar Mohammed Appeals Judgment" (August 10, 2015), EJIL: *Talk!*, *http://www.ejiltalk.org/some-thoughts-on-the-serdar-mohammed-appeals-judgment/* [Accessed September 2,

safeguards is required in order for the detention policy to be 'non-arbitrary' under Article 5 demands further scrutiny.

How can the UK government ensure that a detention policy provided for in UK legislation is 'non-arbitrary' under Article 5? Will the legislation have to comply with the exhaustive list of circumstances under which detention is permitted under Article 5? Unlike the High Court, the Court of Appeal recognised that Article 5 could be interpreted to include other grounds of detention in armed conflict without derogation under Article 15 following from the Strasbourg decision in *Hassan*.[7] It will be argued that in order to ensure that detention is 'non-arbitrary' international humanitarian law could be used to delimit the scope and content of Article 5 in NIACs despite the fact that it does not provide legal authorisation for detention in those circumstances.[8] Alternatively, legislators could draw upon the most expert and inclusive policy reports on detention in NIACs.[9] The analysis seeks to suggest a viable solution for avoiding a violation of Article 5 in relation to detention in NIACs, but also highlights the fact that human rights do not hold the UK armed forces to untenable standards. Conversely, the Convention seeks to provide ways of modifying Article 5 to meet the practical difficulties that may be presented in armed conflict.

2015]; J. Horowitz, "The Reason Why the UK Lost the Serdar Mohammed Case" (August 3, 2015), Just Security, *https://www.justsecurity.org/25184/reason-uk-lost-serdar-mohammed-case/* [Accessed September 2, 2015].

[7] *Hassan v United Kingdom* App No. 29750/09 (ECtHR, 16 September 2014); See fn. 1 paras 116–124.

[8] R. Goodman, "Authorization versus Regulation of Detention in Non-International Armed Conflicts", (2015) 91 Int'l L. Stud. 155, 159.

[9] G. Rona, "Is There a Way Out of the Non-International Detention Dilemma?" (2015) 91 Int'l L. Stud. 32, 58; E. Debuf, "Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict", 91 IRRC 859 (2009).

Facts and Legal Issues

The approach taken by Strasbourg and UK domestic courts to the extraterritorial application of the Convention has changed dramatically over the last five years. In 2011, the Strasbourg court confirmed that when a state agent exercises authority and control over an individual abroad, that individual falls within the "jurisdiction" of that state and the state's obligations under the Convention are be triggered. [10] Previous precedent had provided that "jurisdiction" would be found only when the state exercised "effective control of the territory", a much higher threshold of control required to trigger the application of the Convention.[11] In 2013, the UK Supreme Court confirmed that it would follow the approach taken by the Strasbourg court, broadening the extraterritorial applicability of the Convention to include the "state agent authority and control" test. [12] It also went further than Strasbourg, insofar as it extended the protection of the Convention to UK soldiers abroad.

The 2014 High Court decision of *Serdar Mohammed* addressed whether there was a legal basis for detention under international humanitarian law in NIACs abroad for the purposes of Article 5.[13] It also considered the relationship between international humanitarian law and international human rights law in determining the content and requirements of Article 5. Justice Leggatt found that international humanitarian law did not provide a legal basis under Article 5 for detention in NIACs.[14] In determining the scope and content of Article 5, he found that because international humanitarian law did not provide authority to detain in a NIAC, that it could not be applied in the present case to determine the application of Article 5 in armed conflict.[15] It will be demonstrated that the Court of Appeal engaged in a detailed analysis of whether there was a legal basis for the detention, particularly in relation to the most controversial purported legal basis, international humanitarian law. The analysis section will focus on how *Hassan*, a Strasbourg judgment delivered between the High Court and Court of Appeal decisions, altered the reasoning of the Court in relation to the application of international humanitarian law in

[10] *Al Skeini v United Kingdom* (2011) 53 E.H.R.R. 18 para 133.

[11] *Banković v Belgium* ECHR 2001-XII 333.

[12] *Smith v Ministry of Defence* [2013] UKSC 41; [2013] 3 W.L.R. 69.

[13] *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB).

[14] above para. 293.

[15] above para. 293.

non-international armed conflict, and will suggest ways to ensure legislation of 'non-arbitrary' detention for the purposes of Article 5.[16]

Serdar Mohammed, believed to be – and later confirmed as - a senior Taliban Commander, was arrested and detained by UK armed forces from 7 April 2010 until 25 July 2010 in UK detention facilities in both Camp Bastion and Kandahar Airfield in Helmand Province, Afghanistan for the purpose of bringing him before an Afghan prosecutor or judge. A Minister at the UK Ministry of Defence approved his detention for beyond 96 hours as it appeared likely that questioning him would provide significant new intelligence. The Detention Review Committee at Camp Bastion intended to hand over Mohammed to the Afghan authorities from 4 May 2010 but were prevented from doing so due to lack of capacity and overcrowding in the Afghan Directorate of National Security prison at Lashkar Gah. Mohammed was thereby held in Camp Bastion from 6 May for "logistical detention" until transfer to the Afghan authorities on 25 July 2010.[17] The UK had formulated its own detention policy, Standard Operating Instruction J3-9 (UK SOI J3-9), following a major redeployment of 3,500 UK troops to Helmand province between January and July 2006.[18] Amendment 2 of UK SOI J3-9 was applicable when Mohammed was detained and provided for the extension of detention beyond 96 hours in "exceptional circumstances".[19] The criteria used in deciding whether there could be an extension were whether the extension would provide "significant new intelligence vital for force protection", "significant new information on the nature of the insurgency", and the "length of the extension required".[20]

Although a claim was brought under tort law, the principal claim made by Mohammed was a breach of Article 5 under the Convention. Following *Al Skeini*, the Court found that 'jurisdiction' under Article 1 was established as state agent authority and control had been exercised over the individual during arrest and detention.[21] The Court found that the detention was attributable to the UK and not to ISAF because UK forces had captured and detained Mohammed; Mohammed's detention was authorised by a UK commander and reviewed within a UK chain of command; and the UK detention policy (UK SOI J3-9) was different in crucial

[16] See fn. 7.

[17] See fn. 1 para. 43.

[18] above para. 40.

[19] above para. 265 citing Amendment 2 Part 2 para. 27.

[20] above para. 267 citing Amendment 2 Part 2 para. 27.

[21] See fn. 1 para. 99.

respects from ISAF's detention policy (ISAF SOP 362).[22] A breach of Article 5 would therefore be established unless it could be shown that there was a lawful power to detain which was not arbitrary and which was subject to the required procedural safeguards.[23]

The Court did not find a legal basis to detain under the domestic law of Afghanistan, UNSCR 1890 (2009) or under treaty and customary international humanitarian law for longer than 96 hours.[24] In relation to Afghan domestic law, expert statements provided that armed forces participating under the International Security Assistance Force (ISAF) could detain a suspected criminal for only up to 72 hours before handing them over to the police or prosecutor.[25] In reasoning that UNSCR 1890 (2009) had granted authority to ISAF the Court found that it was for ISAF to determine the conditions under which forces could detain in Afghanistan under UNSCR 1890 (2009).[26] This departed from the reasoning, although not the result, in the High Court decision. Justice Leggatt had found that there was no "clear and explicit" intention to diverge from human rights standards under the UNSCR and therefore that it had not provided for detention beyond 96 hours.[27]

ISAF SOP 362 paragraph 5 held that detention was permitted for a "maximum of 96 hours" after which time the detainee had to be released or handed over to the Afghan authorities.[28] The standards outlined within ISAF SOP 362 were the "minimum necessary to meet international norms".[29] While a detainee could be held for more than 96 hours to ensure her safety in release or transfer this exception did not constitute authority for longer term detention but rather operated to meet exigencies including "logistical" difficulties such as transport or weather conditions.[30] There was no express authority in ISAF SOP 362 for allowing States to depart from those standards and the guidelines in the footnote to paragraph 5 ISAF SOP 362 set 96

[22] above para 51.

[23] above para. 44.

[24] above para. 125.

[25] above paras 130—137.

[26] above para. 149.

[27] See fn. 13 para. 205 citing *Al-Jedda v UK* (2011) 53 E.H.R.R. 23 para. 102. UNSCR 1890 (2009) stated that 'the Member States participating in [ISAF] to take all necessary measures to fulfil its mandate'.

[28] See fn. 1 para. 150.

[29] This appears in the footnote to para. 5 in ISAF SOP 362.

[30]ISAF SOP 362 para. 8.

hours as the maximum time permitted for detention.[31] The Court found that there was "no doubt" that UK SOI J3-9 went beyond that authorised under ISAF SOP 362 as it was only in very limited circumstances that detention could continue beyond 96 hours under the ISAF policy which the Court felt was not reflected under UK SOI J3-9.[32]

The Court then examined whether international humanitarian law authorised detention in a NIAC. The conflict in Afghanistan was classified as a NIAC as it involved multinational forces fighting alongside the forces of the Afghan host State in its territory and with its consent against organised armed groups.[33] The Court accepted the government's labelling of the conflict in Afghanistan as an "internationalised" NIAC placing emphasis on the fact that not all the parties to the conflict were sovereign States.[34] It found that detention in NIACs was not authorised by international humanitarian law treaty law or customary international law.

The absence of a positive prohibition of non-arbitrary detention[35] in international humanitarian law in a NIAC was insufficient legal authority to detain because although states were accorded a wide freedom of action in international law "the freedom [had to be] derived from a legal right and not from an assertion of unlimited will".[36] Secondly, the Court considered the government's argument that there was implicit authority to detain in a NIAC derived from treaty law, specifically Article 3 common to the four Geneva Conventions (Common Article 3) and the 1977 Additional Protocol II to the Conventions (APII). The government relied on express references to "detention" in Common Article 3 and in APII Articles 2, 4(1), 5(1) and (2) and 6 to those "deprived of their liberty or whose liberty has been restricted for reasons related to the conflict" and to "detention" and "internment". The government argued that the premise of those references and the existence of rules in Common Article 3 and APII for the protection of those detained in a NIAC was that there was an inherent power to detain. [37] The

[31] See fn. 1 para. 155.

[32] above para. 156.

[33] above para. 169.

[34] above para. 188, 194.

[35] above para. 196 citing J-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules,* (ICRC, Cambridge University Press, Cambridge, 2005), Rule 99: "Arbitrary deprivation of liberty is prohibited".

[36] above para. 197 citing R. Jennings and A. Watts, *Oppenheim's International Law*, 9th edn (Oxford University Press, 1992) p.12.

[37] above para. 200.

Court followed the ICRC's statement in an Opinion Paper that: "in the absence of specific provisions in Common Article 3 and [APII], additional authority related to the grounds for internment and the process to be followed needs to be obtained, in keeping with the principle of legality". [38] The "additional authority" envisaged was an "international agreement between international forces and the host State, the adoption of the host State's domestic law, or provisions for grounds and process in the standard operating procedures of the international forces".[39] Therefore, in the absence of explicit reference to the power to detain in Common Article 3 and APII, it was necessary for there to be another legal basis for detention, whether that be in an international agreement, the domestic law of the host state or in operational policies of the multinational force in order for detention not to be arbitrary. The Court also confirmed that the power to use lethal force against armed groups did not "logically encompass…operational detention".[40] The Court noted that this was only an a priori argument based on the structure of international humanitarian law rather than on the provisions of Common Article 3 and APII.[41]

The Court noted three additional reasons for not implying a power into Common Article 3 and APII in a traditional NIAC. Firstly, in light of the number of different types of NIACS, it would be necessary to decide which of them qualified for the implication and no criteria were suggested by the government.[42] Secondly, states had explicitly rejected an implied power to detain in Common Article 3 and APII because under the principles of equality, equivalence and reciprocity insurgents would have been entitled to detain captured members of the government's army.[43] Thirdly, finding an implied treaty basis for a detention would not overcome the problem of the lack of treaty guidance on the scope of such a power.[44]

Having concluded that a power to detain could not be implied in treaty law, the Court then considered whether it could be implied in customary international law through state practice

[38] above para. 202 citing ICRC, "Interment in Armed Conflict: Basic Rules and Procedure" (Opinion Paper, November 2014), p. 8.

[39] above para. 204.

[40] above para. 204—207.

[41] above para. 208.

[42] above para. 215.

[43] above paras 216, 178—181.

[44] above paras 217—218.

and *opinio juris*, a belief that state practice amounted to law.[45] The government argued that *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines*, labelled the Copenhagen Principles, was evidence of state practice as this process involved 24 States as participants and took over five years to complete.[46] The government particularly relied on paragraph 3 of the preamble which stated that participants "recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations".[47] However, the Court noted that the commentary to Principle 16 of the Copenhagen Principles stated those principles were not of a legally binding nature and "[could not] constitute a legal basis for detention".[48] The Court could also not see evidence of state practice that had relied on authority based on international humanitarian law to detain in an internationalised NIAC.[49] It emphasised the prohibitory nature of international humanitarian law: its purpose was to provide protection for individuals against state force rather than to facilitate the deprivation of liberty of an individual.[50] Contrary to submissions by the government, a power to detain was not reflected in the 2004 edition of the UK's *Joint Service Manual of the Law of Armed Conflict*[51] and there were other documents that recorded views within the Ministry of Defence that there was no basis upon which UK forces could legitimately detain individuals in Afghanistan beyond 96 hours. Therefore there did not exist the belief that the detention was legally necessary to give rise to customary law.[52]

The Court concluded that authorisation to detain in a NIAC could not be found in treaty or customary law of international humanitarian law but had to be found in the domestic law either

[45] above para. 220.

[46] above para. 223 citing "The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines" (2012), *http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf* [Accessed September 2, 2015].

[47] above para. 224.

[48] above para. 226.

[49] above paras 228—230.

[50] above paras 241, 243.

[51] *Joint Service Manual of the Law of Armed Conflict* (Joint Doctrine and Concepts Centre, 2004) *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf* [Accessed September 2, 2015].

[52] above para. 244.

of the State which detained or of the host State on which detention occurred.[53] Following the decision of the High Court, it found that the detention was not in conformity with Strasbourg jurisprudence under Article 5.[54]

Analysis

The Court indicated that a legal basis could potentially be found in UNSCR 1890 (2009), international humanitarian law, domestic Afghan law or domestic UK legislation. Although a legal basis for detention could potentially be provided for by UNSCR[55] or international humanitarian law,[56] this could be difficult to achieve in practice due to the highly political nature of drafting UNSCRs and in reforming international humanitarian law. Furthermore, it may be difficult in practice to persuade Afghan authorities to amend their domestic laws in order to facilitate UK detention policies in Afghan territory. Providing a legal basis for detention through UK domestic legislation in NIACs has received support due to its achievability.[57] The Court recommended legislation that either prevented claims from foreign nationals or which alternatively provided specific authority to detain in military operations abroad.[58] Due to the fact that preventing foreign nationals from claiming would be discriminatory under human rights law, legislation providing specific authority to detain appears to be the most amenable option between the two.[59]

While the Court provided guidance on how to establish a legal basis for detention, it did not address what standards should be used in ensuring 'non-arbitrary' detention under Article 5. Detention would still have to be 'non-arbitrary' as required under Article 5.[60] Article 5 (1) (a)-(f) provides an exhaustive list of non-arbitrary detention in peacetime[61] which prohibits

[53] above para. 241.

[54] above paras 272, 280–294.

[55] above para. 162.

[56] above para. 251.

[57] See fn. 2.

[58] paras. 10(ii) and 363(iv).

[59] See fn. 2.

[60] *Saadi v United Kingdom* App. No. 13229/03 (ECtHR, 29 January 2008) para. 68: Non-arbitrariness "extends beyond lack of conformity with national law".

[61] *Winterwerp v Netherlands* A 33 (1979); 2 EHRR 387 para 39.

internment.[62] In the High Court decision, a preliminary question arose as to whether Article 5 would admit of any further categories of non-arbitrary detention that were not already designated in the exhaustive list. Justice Leggatt in the High Court decision had expressed the opinion that in order to include internment in armed conflict as non-arbitrary in the exhaustive list, a derogation under Article 15 would be required.[63] Whether or not an extraterritorial derogation was possible, and whether it was required for the application of Article 5 in armed conflict, was a matter of much contention.[64] However, the Strasbourg court confirmed in *Hassan* that it was possible to provide grounds for non-arbitrary detention outside of the exhaustive list without derogating.[65]

Hassan concerned the invasion of Iraq by a coalition of armed forces lead by the US in 2003 and the detention of the brother of a high ranking commander of the Ba'ath Party. The Strasbourg court interpreted the requirements of Article 5 in light of international humanitarian law which was applicable law in the context of the international armed conflict in Iraq. It did not try to fit the detention powers under the Third and Fourth Geneva Conventions into one of the grounds for non-arbitrary detention listed in Article 5(1) (a)-(f).[66] Furthermore, it accepted that a lack of formal derogation under Article 15 did not prevent it from taking into account international humanitarian law when interpreting and applying Article 5.[67] While internment in peacetime did not fall under Article 5, in the context of an international armed conflict and in accordance with international humanitarian law, the taking of prisoners of war and the detention of civilians who posed a threat to security was permitted under Article 5.[68]

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[62] *Lawless v. Ireland* (no. 3), 1 July 1961, paras 13 and 14, Series A no. 3.

[63] See fn. 13 para. 279.

[64] L. Hill-Cawthorne, "Humanitarian Law, Human Rights Law and the bi-furcation of Armed Conflict" (2015) ICLQ 293, 324-325; C. McLachlan, *Foreign Relations Law* (Cambridge University Press, 2014) p. 334; A. Sari, "Derogations from the European Convention on Human Rights in Deployed Operations" Written Evidence to the House of Commons Defence Committee, para. 14. (December 4, 2013) *http://www.publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law10.htm* [Accessed September 2, 2015].

[65] See fn. 7.

[66] above para. 97.

[67] above para. 103.

[68] above para. 104.

The Court of Appeal acknowledged that a derogation was not required to modify Article 5 in an armed conflict.[69] In the context of an international armed conflict, international humanitarian law was invoked to determine the scope and content of Article 5. However, both the High Court and Court of Appeal stated that because international humanitarian law did not provide authority for detention in NIACs, it could not be used to determine the application of Article 5 even if there was an alternative legal basis, and therefore applied international human rights law only.[70] It has been argued that just because a body of law does not provide legal authority for a particular rule does not necessarily mean that it cannot be involved in the regulation of that act. Lawrence Hill-Cawthorne and Dapo Akande have pointed out that it is normal for bodies of law to not provide legal authority for a practice but to regulate that practice nonetheless.[71] Ryan Goodman provides an example: "international human rights law restricts the grounds upon which a State may detain an individual", however, "as a body of law, does not provide the source of authority to detain".[72]

There is evidence in the Court of Appeal decision that it was persuaded that international humanitarian law should be taken into account in determining the scope of Article 5 despite the fact they rejected this line of reasoning for lack of international consensus and clear legal authority that international humanitarian law could be taken into account in these circumstances. The Secretary of State had argued that, following *Hassan*, Article 5 could be modified to meet the requirements of a NIAC.[73] While the Court of Appeal did not accept the argument because international humanitarian law had not provided a legal basis for detention, it proceeded to determine whether the detention conformed with "irreducible core procedural requirements" - devised by the Secretary of State on the grounds they were recognised by international humanitarian law - because the Court felt it was an important question.[74] The Court of Appeal found that in relation to those core procedural requirements, Serdar Mohammed's detention had not been reviewed by an impartial and objective authority;[75] and

[69] See fn. 1 para. 118.

[70] above para 123, para 166, para 281.

[71] L. Hill-Cawthorne and D. Akande, "Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?" (May 7, 2014), *http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/* [Accessed September 2, 2015].

[72] See fn. 8, p. 159.

[73] See fn. 1 para. 122.

[74] above para. 282.

[75] above para. 290.

that he was not given an opportunity to participate in the reviews of his detention.[76] This additional and superfluous analysis points to the fact that the Court of Appeal felt a need to engage in determining whether alternative and modified standards of procedural safeguards would be met in the circumstances, perhaps suggesting a lack of faith in the ability of the human rights jurisprudence alone to regulate detention in NIACs.

UK domestic courts and legislators could draw upon the most expert policy reports on detention in NIACs. Gabor Rona recommends the principles and guidelines developed in the Chatham House Initiative[77] as a good "starting point" for establishing agreement by enough States on a "uniform list of 'floor' requirements" for detention.[78] The guidance provided by the Chatham House Initiative is not law and Rona sees it as merely constituting a "starting point" for establishing agreement on shared principles between states for detention in NIACs, rather than of evidence of agreement. However, its authoritative status and its evidence of international consensus amongst experts should be enough to persuade the European Court of Human Rights that legislation based on those standards provides for non-arbitrary detention.

The guidance offered by the Chatham House Initiative is rudimentary but does provide basic principles governing detention in NIACs. It states that probably the only permissible ground for internment would be for "imperative reasons of security" which it admits would be subject to interpretation.[79] However, concrete examples of where internment is prohibited is internment for the sole purpose of obtaining intelligence, where the person is to be used as a "bargaining chip" such as in the context of hostage-taking, and internment as a method of punishment.[80] The three clear examples of where internment is prohibited can be a starting point through which to assess Mohammed's detention. Although he was initially arrested as a security threat the Court found that his detention beyond 96 hours was predominantly for intelligence purposes.[81] This is clearly prohibited under the Chatham House Initiative.

[76] above para 293.

[77] See fn. 9.

[78] See fn. 9 p. 58. The Copenhagen Principles are also recommended for helping to determine the procedural safeguards that should be in place but do not provide recommendations for grounds of detention.

[79] See fn. 9 pp. 864-865.

[80] above p. 865.

[81] See fn. 1 para. 250.

The principles set out in the Chatham House Initiative constitute a detailed and thoughtful analysis of the relationship between international humanitarian law, international human rights law and the law of domestic states as applied to detention in NIACs.[82] Therefore, the Chatham House Initiative is not separate from the question of whether international humanitarian law should be taken into account under Article 5, but provides detailed guidance on how different bodies of law can contribute to regulation of detention in NIACs.

Conclusion

The Human Rights Act 1998 has played an indispensable role in holding the UK executive to account in its activity abroad. The UK High Court and Court of Appeal delivered impressive judgments in relation to detention in NIACs. Continued success in dealing with complex legal issues relating to detention in NIACs depends upon not being intimidated by the challenges that lie ahead.[83] Denying human rights protection to individuals abroad who are affected by UK government activity by fully domesticating rights is not the answer. Legislative action needs to be taken in response to the meticulous decisions delivered by both Justice Leggatt and the Court of Appeal which both call for a non-arbitrary legal basis for detention in Afghanistan.

[82] See fn. 9 p. 860.

[83] See fn. 1 para. 96.